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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 802

ESTATE OF ISAAC G. JOHNSON,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOHN JAY MCKELVEY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 802

ESTATE OF ISAAC G. JOHNSON,

Plaintiff,

against

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable Supreme Court of the United States:

The Estate of Isaac G. Johnson, plaintiff above named, prays that a Writ of Certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled cause in the office of the Clerk of the Court of Claims on the 2nd day of October, 1944, dismissing the plaintiff's petition.

Opinions

The opinion of the Court of Claims by Littleton, J., will be found at Page 46 of the Record.

The special Findings of Fact will be found at Page 29 of the Record, and the Conclusion of Law at Page 45 of the Record.

Statement

1. The action was begun by the Estate of Isaac G. Johnson as claimant by the filing of its petition in the Court of Claims on December 12, 1942.

2. A General Traverse in answer to the petition of the claimant was filed by the Attorney General on behalf of the United States on January 6, 1943.

3. Thereafter, Hon. Richard H. Akers, commissioner, duly designated by the Court of Claims for the purpose, took the testimony submitted by the respective parties and filed his report with his Findings of Fact on January 7, 1944.

4. Thereafter, the issues came on for trial before the Court of Claims and were argued on May 2, 1944 and submitted on the merits by Mr. John Jay McKelvey for the plaintiff and by Mr. Fred K. Dyar for the defendant, and briefs filed.

5. On October 2, 1944, Special Findings of Fact, Conclusions of Law and Opinion of the Court of Claims of the United States by Littleton, J., were filed and will be found at Pages 29-49 of the Record. Thereafter, judgment was entered dismissing the plaintiff's petition on October 2, 1944.

6. The plaintiff, a New York Corporation, for many years actively operated in the State of New York as a general real estate corporation, buying, selling, exchanging, developing, building, renting and otherwise engaging in the many activities incident to an extensive business over a wide area in the section of New York known as Spuyten Duyvil.

The plaintiff began its operations by purchasing from the executors of one Isaac G. Johnson, who died in 1899, a

part of the real property left by the decedent. Prior to his death, decedent had been engaged in two business activities: (1) the manufacture of steel castings; (2) a general real estate business. Upon his death, he left about twenty acres in area of lands, mostly unimproved, in which he had been dealing, and also the lands and buildings which constituted his steel casting plant.

His sons desired to continue and extend the activities of the father. They organized two corporations—one Isaac G. Johnson & Company which purchased from the estate the manufacturing business, including the plant, the other, a corporation bearing the name "Estate of Isaac G. Johnson" which purchased the miscellaneous real estate. In each case, corporate securities were issued and paid to the estate as consideration for the transfer.

The steel manufacturing business was enlarged and carried on by the sons for upwards of twenty years when it terminated by reason of the condemnation of the entire plant by the State of New York for the widening of the Harlem Ship Canal.

The real estate business was carried on in greatly enlarged form for upwards of twenty-eight years when it was terminated because of the advancing age of the son who operated it.

During the life of the real estate business, the twenty acres originally acquired by the estate were merged into holdings which by purchase from time to time had increased to nearly one hundred acres of improved and unimproved lands. Every form of real estate activity common to an active, going concern was engaged in including the development of special residence parks, the construction of roads, sewers, electric conduits, sidewalks, water and gas mains, single family residences, two family residences, apartment houses, an inn, a club house and a school house for private school.

Subsidiary corporations controlled by the parent corporation, Estate of Isaac G. Johnson, were organized for special purposes, including a construction company, a savings and loan association and two special park development corporations. The business conducted involved the use of capital aggregating several million dollars.

In the conduct of the business, the original twenty acres purchased from the executors of Isaac G. Johnson were merged with the holdings subsequently purchased which were many times in area and value those first acquired. The entire holdings were dealt in alike without distinction as to the source from which acquired.

The certificate of incorporation declared the purposes in language which by no possible construction could be interpreted as a purpose to liquidate property taken over from an estate or any other source.

In 1929, the corporation by resolution declared its intention to cease business and liquidate. From that time it made no further purchases, undertook no further development or construction projects, and engaged in no activities except such as were directed towards sale of its assets and distribution of the proceeds and the maintenance and conservation of such assets pending sale.

Two liquidating dividends were declared as the cash had accumulated to a point where it was considered good judgment to distribute the avails, always having in view the heavy demands for taxes and maintenance pending the complete liquidation.

A series of events unduly prolonged the liquidating period—the financial crash of 1929 followed by the real estate crash of 1932-1933, after which came the long period of real estate depression and then the war.

It is a matter of common knowledge that the real estate market, by reason of these events, during this entire period was so uncertain and, except in special instances of demand

created by defense or other war activities, so dormant that to liquidate holdings, especially unimproved lands, which constituted the bulk of the corporation's holdings, was well nigh impossible.

In spite of the unfavorable conditions, certain public projects initiated by the City of New York resulted in either the sale to the city or the condemnation by the city of a substantial area of the unimproved holdings and by reason of these sales the corporation was able to meet the annual deficits caused by taxes and the upkeep of the properties.

The overhead expense during the years 1937, 1938 and 1939 was reduced to a minimum. Only such clerical work and maintenance and repair work was done as was absolutely necessary to conserve the properties until they could be marketed.

In its capital stock tax return for the prior years 1934, 1935 and 1936, the plaintiff claimed exemption on the ground that it was in liquidation and not doing business within the meaning of the capital stock tax act. After denial of the claim for exemption and the rejection of claims for refund, the plaintiff instituted a suit in the Court of Claims for the recovery of the taxes on the ground that it was not doing business within the meaning of the act. The Court found that "during the period involved the plaintiff has confined its activities to the owning, holding, and preservation of its property with intent to dispose of the same and distribute its avails in liquidation, and did only the acts necessary to continue that status."

The Court held that the plaintiff was not doing business and rendered judgment in its favor. That decision became final without an application for certiorari by the defendant.

The corporation's status remained the same during the following years of 1937, 1938 and 1939. The decision of the

Court of Claims, however, was not recognized by the Commissioner and the Capital Stock Tax was paid and the present suit for refund followed. The same Court upon the same facts reversed itself and after making its Special Findings of Fact, all of which pointed to the inescapable conclusion that the plaintiff was not carrying on business within the meaning of the act, held as a Conclusion of Law: "that plaintiff is not entitled to recover and the petition is therefore dismissed."

It appears from the opinion of Littleton, J. that this result was reached because of a case in the United States Supreme Court *Magruder* v. *Washington*, Baltimore & Annapolis Realty Corp. (316 U. S. 69) which was interpreted as similar in its facts to the present case, although the distinction between the two cases is a glaring one. That the Court's interpretation was erroneous is clearly shown in the Brief which follows:

Statutes

Federal Revenue Act of 1935—Section 105 and Amendments Thereto

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

Federal Revenue Act of 1938—Section 601 and Amendments Thereto

(a) For each year ending June 30, beginning with the year ending June 30, (1936) 1938, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

Internal Revenue Code—Section 1200

(a) Domestic Corporations—For each year ending June 30, beginning with the year ending June 30, 1939, there shall be imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

U. S. Treasury Regulation—64

Article 43 (a)—(5) [Code of Federal Regulations Sec. 137.32 (a)—(5)].

(a) *General*—In general, "doing business" includes such activities as:

* * * * * * *

(5) The orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distribution of the proceeds as liquidation is effected—for example the liquidation of an estate, of properties taken over from another corporation, or of shareholders interests in particular property:

* * * * * * *

Article 43 (b)—(2) [Code of Federal Regulations Sec. 137-32 (d)—(1)]

(d) Exceptions—Ordinarily the exceptions to "doing business" are restricted to limited activities of a corporation. For example:

(1) "A corporation [not including a parent company as specified in subdivision (b)] is not subject to the tax if its corporate powers are limited to the mere owning and holding of property and the distribution of its avails, or although incorporated for the purpose of doing business, if it has retired from the business for which it was organized and has reduced its activities to the mere ownership and holding of property, the distribution of its avails, and doing only such acts as are necessary to the maintenance of its corporate existence and the private management of its purely internal affairs."

Questions Presented

(1) Do the facts as found justify dismissal of the plaintiff's complaint on the ground that the plaintiff was carrying on business within the meaning of the Capital Stock Tax law?

(2) Do the facts as found support the Court's conclusion that the plaintiff was a corporation organized for the purpose of acquiring and liquidating the assets of the estate of a decedent and was during the years in question so engaged, instead of in the orderly liquidation of its own assets?

(3) Do the facts as found support the Court's conclusion that it was a purpose of the plaintiff since 1904, when it was incorporated, to engage in the orderly liquidation of the property acquired by it from the executors of Isaac G. Johnson, deceased, instead of using such property as part of the large volume of assets with which it carried on its extensive real estate and construction business for many years?

(4) Was the Court of Claims correct in holding that its previous decision in favor of the plaintiff in the case of *Estate of Isaac G. Johnson* v. *United States*, 92 Court of Claims 483, has been overruled by the decision of the United States Supreme Court in the case of *Magruder* v. *Washington, Baltimore & Annapolis Realty Corporation*, 316 U. S. 69?

(5) Was the Court of Claims correct in holding that Regulation 64, Article 43(a)(5) (C. F. R. 1938 Sec. 137.32 (a)-(5)) is applicable to the facts as found in the case at bar, or should it have held that said facts bring the case within the exception provided in Regulation 64, Article 43 (b)(3) [C. F. R. 137-32(d)-(1)]

Reason for Granting This Petition

I

That the Court of Claims has drawn contradictory conclusions of law upon facts identically the same in two cases before it between the same parties and it is important that the highest Court shall determine whether the first decision is correct or whether the case of *Magruder* v. *W. B. & A.* Realty Corp., 316 U. S. 69 can serve as a basis for the Court of Claims reversing itself.

II

That it is important for corporate taxpayers to know to what extent the fact that the corporation, in the case of *Magruder* v. *W. B. & A. Realty Corp., supra, was organized for the special purpose of liquidating property acquired from another corporation* influenced the decision of the United States Supreme Court in said case.

III

That the Record, a certified copy of which is presented herewith, shows that the Special Findings of Fact made by the Court were disregarded in the conclusions of law arrived at.

IV

That this case presents for the first time the question of whether the fact that a corporation, organized for the purpose of, and which has for twenty-five years carried on, a general real estate business, purchased from a decedent's estate, a small portion of the property handled by it in its business, has any legal effect on its status as to "doing business" when it decides to liquidate. Does the fact that the property is thus purchased, that it is paid for in cor-

porate securities and that in the final settlement of the decedent's estate such securities are distributed to the beneficiaries under the will, characterize the corporation's business as a liquidating business despite the fact that it is conclusively proved and so found by the Court that the corporation was organized to continue a business carried on by the decedent and for twenty-five years engaged actively in so doing with assets many times in volume and value the property acquired from the decedent's estate.

V

This case presents a question which relates to the application of Treasury Regulation 64 which for the proper administration of the Capital Stock Tax law should be defined so as to leave less opportunity for misunderstanding and misapplication by the Department and the public of its provisions relating to "doing business."

VI

Your petitioner respectfully submits that by the decision of the Court of Claims of the United States it has been denied a refund of taxes erroneously assessed and unjustly collected from it, contrary to the provisions of the law and that it is without remedy unless this Court shall review the decision of the Court of Claims and apply a proper rule of law.

WHEREFORE, your petitioner prays that the petition for a Writ of Certiorari to review the judgment of the Court of Claims of the United States be granted.

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